Calendar No. 275

98TH CONGRESS, 1st Session | SENATE | REPORT No. 98-172

CLARIFICATION OF THE RISK RETENTION ACT

JULY 5, 1983.—Ordered to be printed
Filed under authority of the order of the Senate of JUNE 29 (legislative day, JUNE 27), 1983

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1046]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1046) to clarify the applicability of a provision of law regarding risk retention, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

S. 1046 is intended to make it clear, as was originally intended in the Risk Retention Act, that risk retention and purchasing groups may insure any coverage which constitutes a "product liability" loss as that term is defined in the act. The amendment in S. 1046 will insure that the definitions in the Risk Retention Act are controlling with respect to the scope of insurance coverage that self-insurance groups authorized by the act may provide. The bill does not expand the Risk Retention Act; it merely clarifies the existing scope of the law. The bill does not in any way affect the liability of manufacturers for loss occurring as a result of a product defect.

BACKGROUND AND NEEDS

In 1981, Congress enacted the Product Liability Risk Retention Act, Public Law 97-45 (15 U.S.C. 3901 et seq.). The act was passed to facilitate the ability of businesses to establish self-insurance coverage on a group basis for product liability risks. The law also facilitates the ability of businesses to purchase comprehensive general liability insurance on a group basis. It does this by preempting certain duplicative and burdensome State laws, which have restricted the

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formation of self-insurance groups in the past. Section 3(a) of the act specifically provides:

> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order . . .[1]

The act authorizes risk retention and purchasing groups to insure against "product liability" risks. It defines "product liability" for the purpose of delineating the scope of coverage that groups may provide, in order to facilitate their interstate operation and assure that companies in differing States can join together to establish self-insurance arrangements. In this regard, the act defines "product liability" broadly as liability for damages because of "any personal injury, death, emotional harm, consequential economic damages, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture . . . or resale of a product . . ." Section 2(a)(3). The committee report that accompanied S. 1096 stated:

> In that regard, it should be noted that the definition of "product liability" . . . *serves to define the coverage that may be provided by a risk retention group* . . . In essence, *the definition delineates the boundaries of the preemption of state law* . . . S. Rept. No. 97–172, pp. 7–8 (emphasis added).

Congress clearly recognized that the definition of "product liability" in the Risk Retention Act was broader than the existing law of many jurisdictions, and that the laws of many States do not allow recovery for consequential economic losses in tort cases or for emotional harm unaccompanied by physical harm.[2] Nevertheless, the act included "damages for loss of use of property—an example of consequential economic losses—in the term 'product liability,'" and defined "product liability" to "permit insurance coverage for emotional damages even though an individual does not suffer any physical consequences." S. Rept. No. 97–172, pp. 7–8. The Senate Committee report specifically states:

> *The Committee recognizes that the definition of "product liability" may be broader than the existing product liability laws of many jurisdictions in several respects. . . .*
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> The rational for the inclusion of damages for loss of use of property and emotional harm to individuals is to allow product sellers to protect themselves through risk retention groups against these types of damages in jurisdictions where recoveries for such damages are permitted or where the applicable law may change in the future. *The definition is permissive and concerns permissible coverage.*
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[1] The act specifically identifies those areas that may be regulated at the State level. The licensing State may regulate, for example, the formation and operation of a group, the capital and surplus requirements, the conduct of financial examinations, and the approval of rates and forms (if required). *See* S. Rept. No. 97–172, pp. 6–19.

[2] *See*, e.g., *Seely* v. *White Motor Co.*, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *See* "Restatement (Second) of Torts" at 6436A (1965).

> In sum, the bill is intended to offer insurance opportunities to home builders and other manufacturers and product sellers, but not to [sic] affect their tort liability which remains subject to State law. S. Rept. No. 97–172 pp. 7–8 (emphasis added).

Following the enactment of the Risk Retention Act, the National Association of Insurance Commissioners (NAIC) proposed the adoption of a model State act to assist the States in implementing the Federal act. While this model bill may be a helpful piece of legislation on the whole, it departs from the language of the Risk Retention Act in a critical area and adopts a definition of "product liability" that restricts the scope of the act. It does this by defining "product liability" with reference to each State's tort law, thus making the scope of group insurance coverage dependent upon the nuances in various definitions under State law.[3]

This is in conflict with the language and intent of the Risk Retention Act. As has been demonstrated, both the language of the act and its legislative history clearly provide for a broad, uniform definition of "product liability." All risk retention and purchasing groups are authorized to insure against "product liability" as that term is defined in the Risk Retention Act, and nothing in the act or its intended structure authorizes any State (including a licensing State) to restrict or expand those coverages.[4] A group will qualify, regardless of the features of a group's program or its administrative arrangements, if its "primary activity" consists of assuming and spreading "any portion of the product liability . . . risk exposure of its group members." Section 8(a)(4)(A). The Committee appreciates the concern of some State insurance regulators that the Risk Retention Act not be used as a vehicle to avoid legitimate State regulation of automobile, health, life, and other lines of insurance. However, insurance regulators should not construe the law in a way that defeats the full purposes and objectives of the Risk Retention Act.

S. 1046 is intended to clarify existing law and to remove any legal doubt that the "product liability" risks specified in the Risk Retention Act determine the scope of coverage that risk retention and purchasing groups may insure. The Committee believes that this clarification will help avoid needless litigation and expense regarding the scope of authorized coverage and will eliminate any existing uncertainty that could discourage groups from utilizing their full range of options under the act. For these reasons and to assure the full implementation of the act, the Committee believes that S. 1046 should be adopted.

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[3] This model act has already been adopted by the State of Texas and has been recommended to all of the States by NAIC. In addition, litigation over the authorized scope of group insurance coverage is currently pending in several States.

[4] Section 2(b) of the Risk Retention Act provides that the definition of "product liability," "shall not be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State." This section is not intended to authorize a State to apply a more limited definition of "product liability" for purposes of qualifying risk retention groups or to narrow in any way the scope of coverage these groups may provide. It simply makes clear that the act's definition of "product liability" does not affect the well-accepted rule of law that courts must look to State law as the source of rules and determining a manufacturer's liability for defective products. *See, e.g., McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3rd Cir. 1980) (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Nor does section 2(b) affect the well-settled rule that State law provides the source of rules of decision for interpreting insurance policies in coverage disputes between policyholders and their insurers. See, e.g., *Couch on Insurance 2d*, § 16:19.5 (1982 Supp.).

COMMITTEE ACTION

S. 1046 was ordered favorably reported on June 10, 1983.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., June 17, 1983.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1046, a bill to clarify the applicability of a provision of law regarding risk retention, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, June 10, 1983.

S. 1046 would amend the Product Liability Risk Retention Act of 1981, which allowed businesses to establish self-insurance coverage on a group basis for product liability risks. The amendment would clarify the definition of "product liability," and is not expected to result in any cost to Federal, State, or local governments.

Should the committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee provides the following evaluation of the regulatory impact of the legislation:

The bill creates no Federal regulatory authority and will have no Federal regulatory impact, and by clarifying the relationship of the Risk Retention Act with State law, the bill reduces unnecessary State regulatory actions.

SECTION-BY-SECTION ANALYSIS

The bill amends section 2(b) of the Risk Retention Act (15 U.S.C. 3901(b)) to make it clear that the definition of "product liability" in section 2(a)(3) delineates the coverage that a risk retention or purchasing group may offer to its members. The section as amended also makes clear that the definitions in section 2 preempt any contrary definition under State law. This bill does not, however, affect product liability tort law (which remains subject to State statutes and judicial decisions).

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

PRODUCT LIABILITY RISK RETENTION ACT OF 1981

Section 2 of that Act

DEFINITIONS

SEC. 2. (a) * * *

[(b) The definition of "product liability" in paragraph (4) of subsection (a) of this section shall not be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State.]

(b) Nothing in this Act shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State, and the definitions of product liability and product liability insurance under any State law shall not be applied for the purposes of this Act, including recognition or qualification of risk retention groups or purchasing groups.

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Calendar No. 276

98TH CONGRESS
1st Session

SENATE

REPORT
No. 98-173

PACIFIC FISHERIES DEVELOPMENT FOUNDATION

JULY 5, 1983.—Ordered to be printed
Filed under authority of the order of the Senate of JUNE 29 (legislative day, JUNE 27), 1983

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1424]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1424) to amend Public Law 92-444 to reflect the change in the name of the Pacific Tuna Development Foundation to the Pacific Fisheries Development Foundation, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF BILL

The bill, as reported, makes a technical, conforming change in the Central, Western, and South Pacific Fisheries Development Act. This change reflects the fact that the Pacific Tuna Development Foundation has changed its name to the Pacific Fisheries Development Foundation. Reference to the organization in the act will now reflect this change.

BACKGROUND AND NEEDS

The Pacific Tuna Development Foundation recently changed its name to the Pacific Fisheries Development Foundation. Reference to the organization in the Central, Western, and South Pacific Fisheries Development Act should be altered to reflect this fact.

LEGISLATIVE HISTORY

The bill was introduced on June 8, 1983. It was unanimously ordered reported by the Commerce Committee on June 10, 1983, without amendment.

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Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., June 20, 1983.

Hon. Bob Packwood,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1424, a bill to amend Public Law 92–444 to reflect the change in the name of the Pacific Tuna Development Foundation to the Pacific Fisheries Development Foundation, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, June 1, 1983.

Based on this review, it is expected that no additional cost to the Federal, State, and local governments would be incurred as a result of enactment of this bill.

Sincerely,

Alice M. Rivlin, *Director.*

Regulatory Impact Statement

In accordance with paragraph 1(b) of rule XXVI of the Standing Rules of the Senate, the committee provides the following evalution of the regulatory impact of the legislation:

The bill's only purpose is to make a conforming change in the Central, Western, and South Pacific Fisheries Development Act. This change will have no regulatory, economic, privacy, or paperwork impacts.

Section-by-Section Analysis

The bill is in one section. The one section amends the Central, Western, and South Pacific Fisheries Development Act to reflect the fact that the name of the Pacific Tuna Development Foundation has been changed to the Pacific Fisheries Development Foundation.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

CENTRAL, WESTERN, AND SOUTH PACIFIC FISHERIES DEVELOPMENT ACT

SECTION 2 OF THAT ACT

SEC. 2. The Secretary of Commerce (hereafter referred to in this Act as the "Secretary") is authorized to carry out, directly or by contract, with the [Pacific Tuna Development Foundation] *Pacific Fisheries Development Foundation* a program for the development of the tuna and other latent fisheries resources of the Central, Western, and South Pacific Ocean. The program shall include, but not be limited to, exploration for, and stock assessment of, tuna and other fish; improvement of harvesting techniques; gear development; biological resource monitoring; and an economic evaluation of the potential for tuna and other fisheries in such area.

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